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No. 71-1165

In the Supreme Court of the United States

OCTOBER TERM, 1971

ROBERT HARPER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

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After a jury-waived trial in the United States District Court for the Northern District of Indiana, petitioner was convicted on eleven counts of having knowingly subscribed false revenue forms to the Internal Revenue Service, in violation of 26 U.S.C. 7206(1). He was sentenced to five years' imprisonment to be followed by an equal period of probation. The court of appeals affirmed (Pet. App. A).

Petitioner's sole contention here is that this Court should reexamine and overrule its decision in *Bur-*

deau v. *McDowell*, 256 U.S. 465, which held that the Fourth Amendment did not require exclusion of evidence stolen by a private person without involvement of the government where the evidence was thereafter turned over to the government for its use. Petitioner's argument is that the rationale of *Burdeau* was undermined by *Elkins* v. *United States*, 364 U.S. 206, 222, where the Court spoke not only of the dominant deterrent purpose of the Fourth Amendment exclusionary rule but also of the "imperative of judicial integrity." See also *Terry* v. *Ohio*, 392 U.S. 1, 12-13.

The opinion of the court below, on which we rely, answers petitioner's claim (see Pet. App. A 4-6). We further point out that the courts of appeals after *Elkins* have uniformly rejected attacks upon *Burdeau*, and this Court has consistently denied review. See *United States* v. *Goldberg*, 330 F.2d 30 (C.A. 3), certiorari denied, 377 U.S. 953; *United States* v. *McGuire*, 381 F.2d 306, 312-314 (C.A. 2), certiorari denied, 389 U.S. 1053; *United States* v. *Winbush*, 428 F.2d 357 (C.A. 6), certiorari denied, 400 U.S. 918.[1] Nor has the essential basis of *Burdeau*—that the Fourth Amendment was designed to protect only against searches and seizures involving govern-

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[1] *Williams* v. *United States*, 282 F.2d 940 (C.A. 6), cited by petitioner (Pet. 7), is not to the contrary, since in that case the court of appeals simply applied *Elkins* to a search by state officers. Moreover, the Sixth Circuit subsequent to *Williams* has specifically indicated that *Burdeau* retains vitality. See *Winbush*, *supra*; *United States* v. *Hodges*, 448 F.2d 1309, 1312 (C.A. 6).

mental action—been impaired by any subsequent decision of this Court. Cf. *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388; see *United States* v. *Callaway*, 446 F.2d 753, 755 (C.A. 3), certiorari denied *sub nom. De Vyver* v. *United States*, January 10, 1972 (No. 71-5424) (holding that searches by foreign officers outside the United States do not come within the protection of the Fourth Amendment). Petition offers no reason why the Court should take a different approach in this case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1972.

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